SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0583-16T2

MICHELE M. JELLEY,

Appellant,

v.

BOARD OF REVIEW, DEPARTMENT OF LABOR, NEW JERSEY INSTITUTE OF TECHNOLOGY and STATE OF NEW JERSEY DEPARTMENT OF HIGHER EDUCATION KEAN UNIVERSITY,

Respondents.

Submitted January 17, 2018 – Decided April 10, 2018

Before Judges Carroll and Leone.

On appeal from the Board of Review, Department of Labor and Workforce Development, Docket No. 063,129.

Michele M. Jelley, appellant pro se.

Gurbir S. Grewal, Attorney General, attorney for respondent Board of Review (Melissa Dutton Schaffer, Assistant Attorney General, of counsel; Robert M. Strang, Deputy Attorney General, on the brief).

Respondent New Jersey Institute of Technology has not filed a brief.

Respondent Kean University has not filed a brief.

PER CURIAM

Claimant Michele M. Jelley appeals the decision of the Board of Review (Board) affirming the Appeal Tribunal (Tribunal) and finding her ineligible for unemployment benefits. We affirm.

I.

For every year beginning in 2008 through 2015, claimant was employed as an English adjunct professor during the regular spring and fall terms by the New Jersey Institute of Technology (NJIT). For every year beginning in 2010 through 2015, she was concurrently employed as an English adjunct professor by Kean University (Kean).[1] Claimant made a claim for unemployment benefits on May 10, 2015, when the spring term ended for both adjunct positions. She initially received $2552 in benefits payments for the months of May through July of 2015.

On July 14, 2015, the Deputy Director of the Division of Unemployment Insurance (Division) determined claimant was ineligible for unemployment benefits because she had a reasonable assurance of employment at both colleges for the next regular

[1] Claimant was never employed during the summer and winter sessions except by NJIT for one summer "two to four years ago."

term. The Deputy issued a request for refund for the $2552 she had received. Claimant appealed to the Tribunal.

The Tribunal held a telephonic hearing during which testimony was heard from claimant. Claimant testified that over the course of her seven years with NJIT and five years with Kean, she was typically called "the day before Labor Day Weekend" by both employers and offered an English course to teach for that fall term. Teaching a fall course would also guarantee claimant a position teaching the second half of the English course during the spring term.

The Tribunal affirmed the Deputy's determination, finding as follows. Claimant has worked for NJIT every regular term from 2008 through spring 2015. Claimant has worked for Kean every regular term from 2010 through spring 2015. Claimant would be notified a few days prior to the start of any regular term whether either employer needed her to teach a course dependent on student enrollment numbers. At the conclusion of the spring 2015 term, claimant was not notified by either employer that her services would not be needed in the same capacity for the fall 2015 term. The Tribunal ruled: "Past practice is given considerable weight, and in this case indicates that employment is reasonably likely to continue as it has during every regular school term since her services initially commenced with both employers."

Claimant appealed the Tribunal's decision to the Board. In a January 20, 2016 decision, the Board affirmed the Tribunal's findings of fact and opinion. Claimant brings this appeal.

II.

We must hew to our limited standard of review. Brady v. Bd. of Review, 152 N.J. 197, 210 (1997). "'[I]n reviewing the factual findings made in an unemployment compensation proceeding, the test is not whether an appellate court would come to the same conclusion if the original determination was its to make, but rather whether the factfinder could reasonably so conclude upon the proofs.'" Ibid. (citation omitted). "If the Board's factual findings are supported 'by sufficient credible evidence, courts are obliged to accept them.'" Ibid. (citation omitted). Our review "is limited to determining whether the agency acted arbitrarily, capriciously, or unreasonably." Lourdes Med. Ctr. of Burlington Cnty. v. Bd. of Review, 197 N.J. 339, 360 (2009).

III.

Based on the facts, we uphold the Board's conclusion that claimant was disqualified from receiving unemployment benefits. The Unemployment Compensation Law, N.J.S.A. 43:21-1 to -24.30, provides in relevant part that instructors at educational institutions may not collect unemployment between regular terms

if there is a reasonable assurance they will perform services in the next regular term:

> With respect to service performed after December 31, 1977, in an instructional research, or principal administrative capacity for an educational institution, benefits shall not be paid based on such services for any week of unemployment commencing during the period between two successive academic years, or during a similar period between two regular terms, whether or not successive, . . . to any individual if such individual performs such services in the first of such academic years (or terms) and if there is a contract or a reasonable assurance that such individual will perform services in any such capacity for any educational institution in the second of such academic years or terms[.]
>
> [N.J.S.A. 43:21-4(g)(1) (emphasis added).]

The Division's regulations similarly provide that "[a]n employee of an educational institution shall be ineligible for benefits for any week that begins during the period between academic years or terms . . . if the employee has reasonable assurance of returning to work in any such capacity during the succeeding academic year or term." N.J.A.C. 12:17-12.4(a). The regulation defines a "reasonable assurance" as "a written, oral, or other implied agreement." N.J.A.C. 12:17-12.4(a)(1).

As we have explained, N.J.S.A. 43:21-4(g)(1)

> is tailored to meet the unique ten month term of educational employment. There is a predictable hiatus in the period during which

> actual work is performed, due to the summer vacation, and as long as the employment relationship continues, no unemployment compensation is to be paid. Denial of benefits to these persons "conforms with the Legislature's intent not to subsidize the vacation periods of those who know well in advance that they may be laid off for certain specified periods."
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> [Charatan v. Bd. of Review, 200 N.J. Super. 74, 79 (App. Div. 1985) (citation omitted); see Weber-Smith v. Bd. of Review, 337 N.J. Super. 319, 323 (App. Div. 2001).]

Under N.J.S.A. 43:21-4(g)(1), "claimants must demonstrate that they did not have a reasonable assurance of employment." Id. at 78-79.

We are guided by the Division's long-standing interpretation of "reasonable assurance" in N.J.A.C. 12:17-12.4. In 2003, the Division proposed to amend N.J.A.C. 12:17-12.4(b) "by the addition of the words '[w]here reasonable assurance is subsequently given to the individual between school years or terms,' before 'any ineligibility under this section begins the first calendar week following the date a school employee received reasonable assurance of recall.'" 35 N.J.R. 1527(a) (Apr. 7, 2003). The proposal prompted a comment, and a response by the Division, on what constitutes "reasonable assurance":

> COMMENT: The New Jersey School Boards Association seeks clarification as to what would constitute a "reasonable assurance" as

> referenced in N.J.A.C. 12:17-12.4(b), concerning school employees. . . .
>
> RESPONSE: The Unemployment Compensation Law provides that an unemployed individual who works for an educational institution shall be ineligible for unemployment insurance benefits if he or she files a claim for benefits between academic terms if he or she has a reasonable assurance of performing such services in a similar capacity during the next academic term.
>
> The United States Department of Labor has provided that "reasonable assurance" exists when there is a written, oral, or implied agreement that the employee will perform services in the same or similar capacity during the ensuing academic year or term. Additionally, in those cases where there has been an established pattern of continuing employment over the course of the individual's employment with an educational institution, absent anything to the contrary, a reasonable assurance may be construed even though the individual has not received a written contract.
>
> [35 N.J.R. 2874(b) (July 7, 2003) (emphasis added).]

Having expressed that understanding of "reasonable assurance," the Division adopted the amended N.J.A.C. 12:17-12.4(b). Ibid. We infer the Division intended "reasonable assurance" to have the same meaning in N.J.A.C. 12:17-12.4(a) and (b), which implements (a).

Thus, "the Board grappled with the question facing us during the proposal and comment period." See Bedford v. Riello, 195 N.J.

210, 223 (2008). We read N.J.A.C. 12:17-12.4(a) "along with the Department of Labor's interpretive analysis" expressed "during the comment period." See Utley v. Bd. of Review, 194 N.J. 534, 547-48 (2008). "Because that interpretation by the agency empowered to administer the laws governing [unemployment insurance] is a clear and unequivocal one that does no violence to the words of the rule, we recognize it here." See Bedford, 195 N.J. at 223. Courts "defer to an agency's interpretation of both a statute and implementing regulation, within the sphere of the agency's authority, unless the interpretation is plainly unreasonable." Ardan v. Bd. of Review, __ N.J. __, __ (2018) (slip op. at 21).

The Division's interpretation was reasonable, because it accords with the common-sense understanding of "reasonable assurance." Moreover, our Legislature adopted N.J.S.A. 43:21-4(g)(1) "to achieve compliance with the Federal Unemployment Tax Act," particularly to meet the very similar requirements of 26 U.S.C. § 3304(a)(6)(A)(i). Sulat v. Bd. of Review, 176 N.J. Super. 584, 586 n.1 (App. Div. 1980). In seeking to comply with that federal statute, courts throughout the nation have held "[a] pattern of past employment with a school district and the absence of any indication that the teacher would not be rehired have been considered to be important factors in finding that a teacher has a 'reasonable assurance' of reemployment." Allen v. Dep't of

Labor, 658 P.2d 1342, 1345 (Alaska 1983) (citing cases); see also Patrick v. Bd. of Review, 171 N.J. Super. 424, 426-27 (App. Div. 1979) (following such cases from other states).

Here, the record shows "an established pattern of continuing employment over the course of the individual's employment with an educational institution." 35 N.J.R. 2874(b). Claimant has worked every fall and spring term over her seven years of employment with NJIT, and over her five years of employment with Kean. That pattern strongly indicated claimant would be reemployed for the fall term, even if reemployment was dependent on enrollment numbers. The Division could construe that pattern as a reasonable assurance of reemployment for the next fall term "absent anything to the contrary." Ibid.

In her appellate brief, claimant asserts she "was told by her Supervisors that she would not be contracted for successive terms." However, there is no evidence in the record to substantiate this claim. During her telephonic hearing, the Tribunal asked claimant if NJIT or Kean had provided her with "any information stating clearly that you would not be returning in a subsequent term." Claimant replied, "No. I got nothing from them."

In any event, "an established pattern of continuing employment" may be construed as a reasonable assurance "even though the individual has not received a written contract." Ibid. A

"reasonable assurance of returning to work" does not require "a written [or] oral agreement," if there is an "implied agreement." N.J.A.C. 12:17-12.4(a)(1). Here, the established pattern of claimant's continuing employment provided ample evidence of an implied agreement giving her a reasonable assurance she would be reemployed in the fall term.

Claimant provided the Tribunal with a July 30, 2015 letter from NJIT stating, "To Whom It May Concern: This letter is to confirm that Ms. Michele Jelley does not currently have an active assignment at NJIT. Her last date of employment with the university was May 23, 2015." However, claimant never had an active assignment for the fall term from either employer on July 30 of any year. Nonetheless, she has been offered reemployment for the fall term shortly before Labor Day throughout her seven and five years of employment with NJIT and Kean respectively. Thus, not having an active assignment on July 30 was not evidence that she would not be offered a course to teach for the fall term.

Claimant notes she was not hired for the summer sessions at NJIT at Kean. However, claimant never taught at Kean during the summer, and taught several years ago during the summer only once in her seven years at NJIT. Thus, that she did not teach during the summer did not break her pattern of continuing employment for the fall and spring regular terms. In any event, the Board found

the condensed summer session is not a "regular term" under N.J.S.A. 43:211-4(g)(1).

IV.

Claimant argues that the Board's ruling is inconsistent with previous rulings of the Tribunal on similar matters brought by claimant. However, the facts of claimant's previous successful appeals are distinguishable.

In July 2009, claimant applied for unemployment benefits for July-August 2009. The Deputy determined claimant was ineligible to receive those benefits because she had a reasonable assurance of reemployment. Claimant appealed and the Tribunal reversed, stating that a "reasonable assurance was not established until the claimant was notified that she would be returning [to work]."

However, in 2009, claimant had only been working for NJIT for one year and had not yet been employed by Kean. Thus, unlike here, there was no pattern of continuing employment that would give claimant a reasonable assurance of continued employment.

In May 2012, claimant applied for unemployment benefits for May—August 2012. The Deputy determined claimant was ineligible to receive those benefits because she had a reasonable assurance of reemployment. Claimant appealed and the Tribunal reversed, stating that the claimant "did not have any expectation to return

to work at all . . . . [u]ntil the claimant was notified" by either employer.

However, in 2012, claimant had been employed by NJIT for four years and by Kean for two years. Since then, claimant has worked three more years at both institutions, establishing a much clearer pattern of continuous employment. In any event, the Tribunal's decisions on the facts of claimant's 2009 and 2012 appeals did not prevent it from reaching a contrary result on the more developed facts of this case.

The Board's decision was supported by credible evidence in the record, and was not arbitrary, capricious, or unreasonable.

Affirm.